PRIYATHASENY & ORS

v.

PEGAWAI PENGUATKUASA AGAMA JABATAN HAL EHWAL AGAMA ISLAM PERAK & ORS

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[ORIGINATING SUMMONS NO: 24-1041-2001]
24 MARCH 2003

ISLAMIC LAW: *Apostasy - Jurisdiction to determine question of apostasy - Whether exclusive jurisdiction of Syariah Court*

CIVIL PROCEDURE: *Jurisdiction - High Court - Apostasy - Whether within High Court's jurisdiction*

The 1st plaintiff, an ethnic Malay and born Muslim, renounced the religion of Islam and adopted Hinduism as her religion. She changed her name to a Hindu name and married the 2nd plaintiff, an ethnic Indian and a lifelong Hindu. They have two children, *ie*, the 3rd and 4th plaintiffs. After the birth of the elder child, the 1st plaintiff was arrested and charged for deriding the religion of Islam and for co-habitation outside lawful Muslim wedlock with the 2nd plaintiff until a child was born. The 1st plaintiff on the advice of her peguam *syarie* pleaded guilty and was convicted and fined RM5,000.

In this instance, the plaintiffs applied for various declarations, *inter alia*, that they were not Muslims and that they professed the Hindu faith. A preliminary objection ('PO') was raised on the jurisdiction of the court to hear this application.

Held:

[1] The central and substantive issue was whether the 1st plaintiff remained a Muslim despite her so-called renunciation of the Islamic faith and professing now the Hindu faith and practice. Pegged to this was also the issue of whether her husband, the second plaintiff remained a Muslim in spite of the allegation that he was coerced into converting. This issue was the core subject matter of this application in spite of the various other declarations sought for. Based on the case of *Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*, the central issue was clearly out of the jurisdiction of the civil court and was a matter that could only be determined by the Syariah authorities. (pp 226 h & 227 a-f)

[PO upheld; application dismissed.]

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201 SC ***(refd)***

Mohd Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(refd)***

Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 FC ***(foll)***

Legislation referred to:

Administration of Islamic Law Enactment Perak, s. 13

Enakmen Jenayah (Syariah) 1992, s. 13

Federal Constitution, arts. 3, 4(5), 5, 8, 11(1), (2), 12(3), 121(1A), 153(1), 160

For the plaintiffs - K Shanmuga; M/s Kanesalingam & Co

For the 1st & 2nd defendants - Jazamuddin Ahmad Nawawi; Pen. Penasihat Undang-Undang Negeri Perak

For the 3rd defendant - Siti Malinda Hj Kamaludin; M/s Kamaluddin Maamor & Co

For the 4th defendant - Abdul Aziz Rahim SFC

For the 5th defendant - Ramdas Tikamdas; M/s Siva Ram & Assoc

[The plaintiffs have filed an appeal to the Court of Appeal vide Civil Appeal No: A-01-24-2003]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Embong J:

The plaintiffs are seeking for various declarations which include, *inter alia*:

i) that the definition of the word 'Muslim' in the Administration of Islamic Law Enactment 1992 of Perak is repugnant to art. 11(1) read with art. 160 of the Federal Constitution and is therefore null and void;

ii) that no permission or decision from the Syariah Court is necessary for the first plaintiff to profess the religion of her choice since such requirement is *ultra vires* art. 11 of the Federal Constitution;

iii) that the first plaintiff is no longer a Muslim since she professes herself to be a Hindu and practises that faith;

iv) that the first plaintiff is no longer a Muslim in view of her conviction for apostasy and that she had paid the fine imposed by the Teluk Intan Syariah Court;

v) that the first and second plaintiffs should not be subjected to any arrest or detention if they chose to profess and practise a religion of their choice pursuant to their fundamental liberties under the Federal Constitution;

vi) that the plaintiffs should not be compelled or required to undergo any form of education training or initiation of the Islamic faith and these would be contrary to arts. 3, 4(5), 5, 8, 11(1), 11(2), 12(3), 153(1) and 160 and Schedule 9 of the Federal Constitution;

vii) that the conversion of the second plaintiff to Islam was made under coercion and thus is null and void;

viii) that the first plaintiff be at liberty to use her chosen Hindu name of Priyathaseny in place of her given former name of Zuraidah binti Hassan;

ix) that the prohibition on the first plaintiff to marry the second plaintiff while she was a Muslim is *ultra vires* art. 5 of the Federal Constitution.

The brief facts and summary of reliefs sought not in dispute, may be extracted from the following summary set out in the written submission of learned counsel for the plaintiffs, for which this court is most grateful. They are:

5. The 1st plaintiff, though ethnically a Malay and born a Muslim, renounced the religion of Islam about 5 years ago, and adopted Hinduism as her religion. She changed her name to a Hindu name, and married the 2nd plaintiff, an ethnic Indian and a lifelong Hindu, and they have two infant children, the 3rd and 4th plaintiffs.

6. After the birth of her elder child and while carrying her second, the 1st plaintiff was arrested, charged for deriding the religion of Islam (for the actions she took to leave Islam) and for cohabitation outside of lawful Muslim wedlock with the 2nd plaintiff until a child was born (to wit, the 3rd plaintiff). The 1st plaintiff, on the advice of her Peguam Syarie pleaded guilty, and was convicted and fined RM5,000/-. She spent a total of 3 nights in detention – on remand prior to her being released on bail, and in a detention cell pending payment of her fine.

7. The 1st plaintiff now seeks declarations under the Federal Constitution that her continued treatment as a Muslim, and the criminal sanctions imposed or threatened to be imposed against her despite the fact that she no longer professes the religion of Islam, is unconstitutional.

8. The 2nd plaintiff went through a formal conversion to Islam which he says was done under a state of duress as he was advised that his wife would go to jail unless he went through the formal conversion to Islam. However, the 2nd plaintiff professes Hinduism, and has never practised the rites and rituals of Islam.

9. The 2nd plaintiff also seeks declaratory relief that he too is not subjected to Islamic law as he does not profess the religion of Islam. The 1st and 2nd plaintiffs have also decided for the 3rd and 4th infant plaintiffs that their religion is Hinduism.

At the outset of the hearing, learned counsels for the first to fourth defendants intimated that they are raising a preliminary objection on the question of this court's jurisdiction to hear this matter which I allowed to be argued first. This objection is premised on the argument that since the central issue to be adjudicated is the question of apostasy of the first plaintiff, a matter that could only be determined by the Syariah Court, this court therefore is not seized with the jurisdiction to hear this application.

Learned senior federal counsel Dato' Abdul Aziz bin Abdul Rahim for the first and second defendants submitted that the crux of this application is the declaration sought for in prayer 5 *viz.* whether the first plaintiff is still a Muslim. The other prayers sought for although they may well be within this court's jurisdiction to hear and determined are, in his view, merely peripherals and could not on their own be considered without determination of this central question. Dato' Abdul Aziz Abdul Rahim relied on two decisions of the apex court in *Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5 and *Mohd. Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264 to support his argument that the jurisdiction this court is now ousted if the matter for determination is one exclusively within the jurisdiction of the Syariah Court under the relevant State Enactment enacted pursuant to Schedule 9 of the Federal Constitution.

Reference was made to s. 13 of the Administration of Islamic Law Enactment, Perak (encl. 2/92) which provides that apostasy committed by a Muslim is an offence punishable with either a RM2,000 fine or imprisonment for a term of up to two years. Reference was also made to Part IX of that Enactment which provides for the mode and procedure of embracing Islam and the requirement for registration for such a conversion.

The learned federal counsel for the 3rd defendant, Encik Jazamuddin in supporting the abovementioned objection also referred to the decision in *Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors* [1999] 3 CLJ 539 wherein Abdul Hamid bin Mohamad J, had considered the Federal Court decision in *Soon Singh* and had opined that the test suggested by the apex court is one of 'subject matter test' as found in the following passage of the Federal Court's judgment:

> Whilst we agree with the approach adopted by Abdul Hamid J following *Habibullah*, that when there is a challenge to jurisdiction the correct approach is to look at the State Enactments to see whether or not the syariah courts have been expressly conferred jurisdiction on a given matter, with respect, we do not agree with his Lordship's conclusion that since the Penang Enactment did not expressly confer jurisdiction on the syariah court over the matter raised, there was no impediment for the civil court to hear and dispose of the matter.

The learned judge was of the view that it does not matter what was sought for in the declarations prayed for. The court has to therefore scrutinise what was the subject matter at hand in order to determine whether it has the jurisdiction to hear the application.

For the plaintiffs, learned counsel, Encik K. Shanmuga submitted that the declarations sought are constitutional in nature and especially calls for the interpretation of the phrase 'the right to profess and practise his religion' as found in art. 11 of the Federal Constitution. He argued that prayer 5 is not the main thrust of this application which actually is seeking for a declaration that Enactment 2/92 is *ultra vires* the Federal Constitution. He also submitted that the provision regarding apostasy is also in contravention of art. 5 of the Federal Constitution. He further submitted that the first plaintiff had professed the religion of her choice ie Hinduism since 1997 when she married the second plaintiff, and had chosen to change her given name to that of Priyathaseny, the name she now uses. Since the issue at hand is a constitutional one, learned counsel submitted that it would not be right for the Syariah Court to determine this application. Further, to remit this matter to that court would put the plaintiffs in jeopardy effacing further criminal charges.

Learned counsel for the fifth defendant Encik Ramdas Tikamdas did not support the preliminary objection raised by the other defendants but did not advance any argument against it.

Clause (1A) of art. 121 of the Federal Constitution provides that the High Courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court thus ensuring no conflict in jurisdiction. What this court needs to now determine is whether the matter at hand is within the jurisdiction of the Syariah Court. If the answer to this question is in the affirmative then clearly art. 121(1A) prohibits the hearing of the merits of this application by this court. The preliminary objection is therefore well taken and requires determination lest this court falls into an error of jurisdiction in adjudicating this application, (see *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 and *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman* [1992] 3 CLJ 1675; [1992] 1 CLJ (Rep) 201).

Learned counsel for the plaintiffs forwarded a two pronged argument namely, that since the plaintiffs do not profess the Islamic faith the Syariah Court therefore has no jurisdiction to determine their status. Secondly, he argued that this application requires a consideration of the constitutional validity of the relevant State Enactments and must therefore be within the jurisdiction of the civil court. Learned counsel also said this:

> To send this case to Syariah Court would be to give the Syariah Court powers over persons who do not profess Islam in Malaysia – a country comprising people professing and practising so many different religions. This cannot be right, particularly as the Federal Constitution expressly provides that the Syariah Courts shall have jurisdiction "only" over persons "professing the religion of Islam".

In my view the central issues to be determined are as found in the declarations sought under prayers 5 and 15 which are now reproduced. They are:

> 5. The 1st Plaintiff is no longer a Muslim because she professes herself to be a Hindu and practises the Hindu religion and way of life by choice.
>
> 15. The certificate of conversion to Islam number 13104 of the 2nd plaintiff dated 30 October 2000 issued by the 3rd defendant is null and void and of no effect as the 2nd plaintiff went through a form of conversion to Islam under duress in that the 2nd plaintiff at all material times was terrified because the 2nd plaintiff was threatened that his wife the 1st plaintiff would be imprisoned if the 2nd plaintiff did not go through the process of converting to Islam.

These matters are quite clearly matters that fall within the jurisdiction of the Syariah Court. The issue of apostasy committed by the first plaintiff is governed by s. 13 of the Enakment Jenayah (Syariah) 1992 which states:

> 13. Any Muslim who wilfully either by his action or words or in any manner claims to denounce the Religion of Islam or declares himself to be a non-Muslim is guilty of an offence of deriding the Religion of Islam and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Further, the matter of conversion of a person to Islam is governed under part IX of the Administration of Islamic Law Enactment 1992 and is also a matter within the jurisdiction of the Syariah Court to determine any question on whether a person has or has not embraced Islam (see s. 104).

In my considered view, the preliminary objection is sound and I agree with the views expressed by learned counsels for the first to fourth defendants that this court is not seized with the jurisdiction to determine this matter. Although

there are various declarations sought for by the plaintiffs including, as submitted by their learned counsel, one on the interpretation of the word 'profess', it is this court's finding that the central and substantive issue is whether the first plaintiff remains a Muslim despite her so-called renunciation of the Islamic faith and professing now, the Hindu faith and practice. Pegged to this is also the issue of whether her husband, the second plaintiff, remains a Muslim in spite of the allegation that he was coerced into converting. This issue is the core subject matter of this application in spite of the various other declarations sought for. These are, as described by learned senior federal counsel, Dato' Abdul Aziz and with whom this court agrees, 'peripheral issues' that should not cloud the focal issue. Having said that, I am now guided by and bound by the pronouncement of our apex court in *Soon Singh* that the jurisdiction of this court is now ousted from determining the merits of this application. This central issue is clearly out of the bound of jurisdiction of the civil court as it is clearly a matter that can only be determined by the Syariah authorities. *Soon Singh* was analysed in detail by my learned brother, Abdul Hamid Mohamad J who came to the following conclusion and with which I fully concur and adopt. He concluded:

> My understanding of the judgment is as follows:
>
> (a) when there is a challenge to the jurisdiction of the Syariah Court (or for that matter of this court *vis-a-vis* the jurisdiction of the Syariah Court) the court should look at the State Enactments, not the State List to see whether Syariah Court has jurisdiction over the matter and if it has, then, this court has no jurisdiction over the matter;
>
> (b) however in the case of conversion **out** of Islam, since the relevant Penang State Enactment (indeed the Enactments of other States) contains provisions regarding conversion **into** Islam, the jurisdiction over conversion **out** of Islam, may be inferred.

For these reasons, the preliminary objection is upheld and this application is hereby dismissed with costs.